Case No. 2828.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ALASKA PACIFIC FISHERIES, a Corporation, et al.,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

Reply Brief of Appellants

Upon Appeal from the District Court for the Territory of Alaska, Division No. 1.

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FRANK D. MONCKTON, Clerk.

By....., Deputy Clerk.

The James H. Barry Co.,
San Francisco

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REPLY BRIEF.

Replying to statements in the brief filed in behalf of the appellee, we deem it right to traverse unwarranted assertions and misstatements therein as follows:

There is no group of islands within the Alexander Archipelago which may be properly designated as the Annette *Islands* comprising one main island and surrounding smaller islands. The Government chart may be referred to for the purpose of accurate geographic information. It shows that each of the small islands surrounding Annette Island is distinct and is identified by a name.

The record contains no evidence justifying the statements made on page 2 of appellee's brief with respect to the supervision of the Annette reservation

by the Department of the Interior. It is true, however, as stated, that William Duncan until very recently was the actual and active teacher and leader of the Metlakahtlas.

On page 2 is found the further statement that "Congress has appropriated money from time to time for purposes of improving the condition of these people." There is nothing in the record to show that any of such appropriations were ever made, nor is our attention directed to any act of Congress making the appropriations. We dispute the fact that any moneys have ever been appropriated by the Government for the purposes mentioned prior to the time that Father Duncan was deposed by the Bureau of Education.

The statement on page 3 respecting the alleged arrangement made with P. E. Harris to manage the operation of the cannery on Annette Island, is misleading; there being nothing in the testimony to warrant any assumption that Mr. Harris was appointed to manage a cannery for the Metlakahtlas or the Department of the Interior, or to instruct or train the Metlakahtlas in the science of fish canning.

The Court will find on pages 118 and 119 of the record, the only substantial testimony bearing on this point, as follows:

> "Q. Now, you say you received information from the Secretary of the Interior in regard to this proclamation on the 4th of May?

"A. From the Assistant Secretary.

"Q. How did he come to notify you about it?

"A. Because I was corresponding with him.

"Q. How long had you been corresponding with him?

"A. Some time about the middle of March, I think—I am not positive (94) of the dates.

"Q. You were corresponding with him in regard to fishing in these waters, weren't you?

"A. I was corresponding with him in regard to the Harris lease—I had heard of it and I wanted to get a copy of the lease—I wanted to see what was being done.

"Q. You knew about the Harris lease, then, as early as last March?

"A. I knew there was a contemplated lease, but I was advised by our representative at Washington that Secretary Redfield had interfered and that no fishing rights would be given to anybody—that everybody would be treated alike in those waters; that there wouldn't be any special fishing privileges.

"Q. You knew there was a question about the rights to fish in those waters as early as March, did you?

"A. As I told you, I received word that there would be no special fishing privileges given anybody—it was to be left open—that the lease would not carry with it any special fishing privileges."

There is not a particle of testimony in the case to sustain the claim that for twenty-five years, or for any period of time, citizens have been excluded from fishing in the waters contiguous to Annette Island.

Another statement that is misleading is on page 4 to the effect that Mr. Burckhardt had foreknowledge

of the intended arrangement with Harris and that he "was advised that no fishing rights would be granted to anybody in these waters." Mr. Burckhardt's testimony, above quoted, will not bear an interpretation implying notice to him that by refusing to grant fishing privileges there would be no prohibition of fishing. On the contrary, his information on the subject was to the effect that the proposed lease would not carry special fishing privileges and that the fishing ground would be left open.

The affidavit of Harris on pages 54 and 55 of the record to the effect that Heckman had made statements conveying the impression that he had knowledge of the intended proclamation before it had been issued, is altogether too flimsy to support an argument in this case, but in this connection we wish to direct attention to the inaccuracies abounding in the statements which the brief contains; the affidavit of Harris does not state that Heckman said that he had orders to construct a fish trap. What the affidavit does say is that the orders under which Mr. Heckman claimed to be acting were to continue the construction of a trap.

The evidence is conflicting as to whether or not the trap had been put in fishing condition by hanging the webbing thereon previous to the date of the proclamation, but there is nothing to justify a statement in the brief that the trap was completed by capping the same after the date of the proclamation.

It is true that the cannery on Annette Island was

destroyed by fire, but there is nothing in the evidence to warrant any assertion as to the cause of the fire or justify an insinuation that it was of incendiary origin.

The evidence is lacking to give any support to self-praise on the part of any officials for *patient effort* to allay friction between the Government and the majority of the natives on one side and Father Duncan and a few of the older natives on the other side, which the brief states had been in progress for half a dozen years. The evidence, on the contrary, shows that William Duncan (known as Father Duncan) had gone to old Metlakahtla in British Columbia some years prior to the passage of the Congressional Act setting aside Annette Island, to which reference has been made, had taught the natives many useful trades and had, to a large extent, led them into the ways of civilization; that a bishop, who had taken no part in the good work carried on by Father Duncan, came upon the ground and arbitrarily deposed him because of some trivial dispute in relation to the church ceremonials; that this courageous and determined man, rather than submit to this unwarranted conduct on the part of the Bishop, gathered about him the Indians who had become attached to him because of the good he had bestowed upon them, and leaving behind the many splendid buildings he had erected, left old Metlakahtla and emigrated to Annette Island to found a new colony where he could continue his

labors without interference on the part of outside church dignitaries. Here a new village was reared, a new church, new schoolhouse and new homes were erected, and a little later a cannery and saw-mill. According to the statement of Senator Jones on the floor of the Senate in the portion of the Congressional Record hereinafter referred to, the moneys for this purpose were supplied by philanthropic persons, and later on their interests were in turn purchased by Father Duncan himself, who successfully operated the cannery and saw-mill with the assistance of the natives, and this without any aid from the Secretary of the Interior, the Government of the United States or anyone else, and without the aid of a private fishery or any special privileges whatsoever.

On page 3 of appellee's brief, it is stated that about six years ago the Interior Department decided to assume exclusive control of all the material interests of the Indians living on the reservation, leaving only the supervision of spiritual affairs in the charge of said Duncan. This is a fair statement of what happened. The Interior Department took the cannery, the saw-mill and all the other property that had been accumulated and acquired by Father Duncan, and by the Indians under his leadership, and appropriated it and told the old Leader that he could content himself henceforth by ministering to the spiritual affairs of the natives. It is stated in the brief of appellee that this resulted in friction. Small wonder that the un-

conquerable spirit of Father Duncan, who had refused to submit to the dictation of an outside bishop, who had abandoned the property he had acquired in old Metlakahtla and emigrated to a new country and there again had built up an industrial community and acquired vast property interest, the result of a life work, should rebel against this arbitrary and unwarranted conduct on the part of the Interior Department. Father Duncan is not an ordinary man but a man of unusual and extraordinary ability, one who would succeed beyond measure in any walk of life, and it was a cruel thing for the Interior Department to shove him aside in his old age and arbitrarily and unceremoniously take from him the product of his life's toil. To tell him that he might still minister to the spiritual wants of the Indians was merely adding insult to injury. That the Interior Department should, because of Father Duncan's advanced age, do what they could to co-operate with him, cannot be doubted, but it is one thing to co-operate with him and another thing to discard him altogether. What the Government did in the last half a dozen years in the way of quieting the friction that existed on Annette Island did not consist in the harmonizing of discordant elements but simply in using the strong arm of the Government to crush Father Duncan and his supporters who were opposed to their regime.

It is next contended in the brief that the act of Congress should be so construed as to include the

surrounding waters, and the same reasons urged by the trial Court in its opinion are again restated. These have been fully discussed in our opening brief, so that further reference thereto will not here be made.

On page 8, however, it is stated: "Furthermore, "the construction placed upon the statute by the offi- "cers whose duty it is to execute it, is entitled to "great consideration." That the construction placed upon the statute by the officers whose duty it is to execute it, is entitled to consideration when the statute is called to the attention of the courts, cannot be doubted, but is this case the officers whose duty it was to execute the statute, so construed it that it did not include any of the waters surrounding the island. This is evident from the fact that the President was asked and did make a proclamation so extending the reservation as to include these waters, for obviously, if in the opinion of the officers called upon to construe the act these waters were already included it would be an idle ceremony for the President to make the proclamation referred to.

In the appellant's opening briefs the good faith of the Government in instituting this cause is distinctly challenged, and the false pretenses of the President's proclamation are denounced in a way to call for a response from the appellee, but we find in the brief only a reiteration of vague suggestions of a purpose to assist the Metlakahtlas to self-support and to resume the operation of the cannery, to be effected through

an *arrangement* with one P. E. Harris, to manage the operation of the cannery, to the end that in due course of time the operatives of said cannery would become fully trained in all branches of the fish canning business so that they would be competent to conduct this line of industry themselves.

There is not a particle of evidence as to the abilities of Mr. Harris, and the Court would be unwarranted in assuming that operation of the cannery under his management would prove to be more successful than it had been in years previous when the Metlakahtlas were operating it without any supervision or instructions other than those afforded by Father Duncan.

We wish now to especially emphasize the point that the Government has failed to introduce evidence to inform the Court as to the details of any arrangement made with any person whomsoever to meet any object which the Interior Department may have in view with respect to the fish industry in Alaska. What is claimed in behalf of the Government in this case is not only unsupported by evidence but we reiterate is absolutely untrue.

And now to supply the omission of information which the Government should have introduced in support of the averments of its bill for an injunction, we submit herewith the full details of the Government plan as set forth in a public document bearing directly upon this subject. In doing so we assume that the Court will, from curiosity if not from a more substantial reason, desire to be thus informed.

In the month of June of this year the Senate of the United States had under consideration the annual appropriation bill for sundry civil expenses of the Government, and on pages 11555-6 of the Congressional Record the following appears:

"Mr. NELSON—Mr. President, I offer the amendment I send to the desk, to come in at the end of line 26 on page 122.

"The VICE-PRESIDENT—The amendment will be stated.

"The SECRETARY—On page 122, at the end of line 26, it is proposed to insert:

"'For the purpose of encouraging industry and self-support among natives of Alaska, and of assisting them in the establishment of small industrial enterprises, $25,000, or so much thereof as may be necessary, to be immediately available and to remain available until expended, which sum may be used for the erection and repair of buildings, purchase and repair of machinery, tools, implements, and other equipment necessary, in the discretion of the Secretary of the Interior, to enable the natives of Alaska to become self-supporting: Provided, That said sum shall be expended under conditions to be prescribed by the Secretary of the Interior for its repayment to the United States on or before June 30, 1926, and any such sums so reimbursed are hereby reappropriated and made available for expenditure, in the discretion of the Secretary of the Interior, prior to June 30, 1926, for the purposes above indicated. The Secretary of the Interior shall annually submit to Congress on the first Monday in December a detailed report of all moneys received and expended hereunder for the purpose of encouraging industry and self-support among natives of Alaska.'

"Mr. NELSON—Mr. President, this is estimated for in the Book of Estimates, and for that reason, unless objection is made, I am unwilling to take up the time of the Senate in debating it.

"The PRESIDING OFFICER (Mr. Overman in the chair)—Is there any objection to the amendment?

"Mr. MARTIN of Virginia—My attention was diverted, so I shall be obliged if the Senator will briefly state what he proposes to do. There were several Senators talking to me.

"Mr. NELSON—My statement was, Mr. President, that this has been estimated for in the Book of Estimates; and in view of that fact, unless particular objection is made, I am unwilling to take up the time of the Senate in discussing the merits of the amendment.

"Mr. MARTIN of Virginia—I will ask the Senator what is the purpose of the appropriation? I understand it is $25,000.

"Mr. NELSON—It is for the purpose of relieving what is known as the Father Duncan Colony of Indians on the Annette Islands in Alaska. It is in the Book of Estimates.

"Mr. MARTIN of Virginia—On the judgment of the Senator from Minnesota I will make no objection to it, though, of course, we will have to investigate it when we get it into conference. I am entirely without information on the subject. I make no objection to it. It is estimated for, and I make no objection to it.

"The PRESIDING OFFICER—The question is on agreeing to the amendment.

"The amendment was agreed to.

"Mr. JONES—In connection with the amendment of the Senator from Minnesota, I wish to put some facts into the Record, in order that the conferees may have before them in the consideration of the item.

"The PRESIDING OFFICER—Without objection, it will be so ordered.

"The matter referred to is as follows:

"In August, 1887, William Duncan, an independent missionary, working among the Tsimpsean Indians of British Columbia, brought to the Annette Islands, in the southeastern part of Alaska, a colony of between 800 and 1,000 of these Indians from the old town of Metlakahtla, in British Columbia.

"By act of March 3, 1891 (26 Stat., 1101), Congress set apart Annette Islands for the use and occupancy of these Indians, under such rules and regulations and subject to such restrictions as might be prescribed from time to time by the Secretary of the Interior.

"Under the leadership of Mr. Duncan, this colony made rapid progress. The heads of families of the colony built good homes on lots set apart for them, a large church house was built, a schoolhouse, and other public buildings. A salmon cannery and a sawmill were established, first through the co-operation of Mr. Duncan, the Indians, and philanthropic persons in the United States. Later Mr. Duncan bought the interests of these persons and of the natives and ran the cannery and the sawmill as his personal property and employed native labor.

"In recent years Mr. Duncan, who is now 84 years old, has lost his control over the Indians, and the cannery and sawmill have not been operated within the last four years. Since these industries closed the Indians have no means of making a living on the island and have had to go away for employment. The school had also been closed. Four years ago the Government established in the village of Metlakahtla a school, which it now maintains with five teachers. In order to give the Metlakahtlans an opportunity for self-support on

the island, the Secretary of the Interior decided last winter to put the cannery and the sawmill again in operation. To this end the cannery building was leased for a term of five years, beginning April 1, 1916, to P. E. Harris, a cannery operator of Seattle, Wash., on terms which it was estimated would produce an annual income of $7,500 for the village and at the same time give employment to a large percentage of the inhabitants.

"On May 17, while necessary repairs on the building were being made by the lessee and while he was awaiting the arrival of new machinery, the cannery building was completely destroyed by fire, as were also the warehouse and a portion of the wharf. Because of this loss by fire the lease is rendered ineffective. The Secretary is unable to require the lessee to fulfill its terms.

"The natives are, therefore, again without any means of support on the island, nor is there any way of providing for such support until the cannery can be replaced and the sawmill repaired. There is also pressing need for the repair of the pipe line which brings water from a mountain lake to the village, and without which there is no adequate supply of water either for drinking or for protection against fire.

"It is therefore urged that the $25,000 recommended as a reimbursable fund for use in aiding the natives to establish industries (Book of Estimates, 1917, p. 953), but not allowed by the House, be appropriated with the understanding that its first use shall be for the rebuilding of the cannery and the repairing of the sawmill and the pipe line at Metlakahtla and for assisting the natives in the operation of these industries.

"FACTS IN REGARD TO METLAKAHTLA AND THE IMMEDIATE NEED OF A REIMBURSABLE FUND.

"(1) Until the close of the industries four years ago about 800 Indians lived on the island. Every family had a good home. Most of the houses had from four to eight rooms. There were many smaller industries dependent on the cannery and the sawmill.

"(2) After the close of the industries many families moved away, and many of them have taken up permanent homes in places not so desirable as Metlakahtla would be if the industries were reestablished. All do leave the island for work in the summer except a few old men and women. When they leave they must carry their children with them. Last summer when fire occurred in the village only two Indians were on the island, and the village would have been destroyed but for the presence of two Government school-teachers and a young Indian who had come over from Ketchikan for the night. The nearest place at which employment can be had is 15 miles away. When the Indians leave the island they must abandon their houses and lose their value, as they cannot be sold.

"(3) After the Government school was established and there was hope for profitable employment on the island the Indians began to return, and there was an increase of approximately 100 in the population within a year.

"(4) The burning of the cannery has almost produced a state of despair among the Indians. The island will be rapidly deserted if the cannery is not rebuilt.

"(5) With the $25,000 asked for as a reimbursable fund, the cannery can be rebuilt and equipped, the sawmill repaired to produce lumber for the cannery, and the pipe line repaired to bring

water for the use of the village, the cannery, and the sawmill.

"(6) The operation of the cannery and the sawmill will enable the Indians to remain at home during the summer, cultivate their gardens, conduct co-operative stores, and maintain other small industries.

"(7) The operation of the cannery, mill, and other industries will enable the village to repay to the reimbursable fund at least $5,000 a year, which can be used to assist other native villages in establishing small industries. It will also provide, in addition to this, a small income for much-needed improvements in the village.

"THE HYDABURG COLONY.

"By executive order, June 19, 1912, a tract of approximately 12 square miles on the west coast of Prince of Wales Island, in southeastern Alaska, was reserved for the use of a colony of natives who had migrated thither from the villages of Klinquan and Howkan and founded a settlement, which they named Hydaburg. Under the supervision of the teacher of the United States public school, the Hydaburg Trading Co. was organized to transact the mercantile business of the settlement and the Hydaburg Lumber Co. to operate a sawmill. The Hydaburg people have turned a dense forest into a thriving little town, with a busy wharf, a sawmill that turns them out good lumber at a cost of $10 a thousand; neat, single-family homes instead of the communal houses in which they lived in their old villages; a long, boarded street, of which they are proud as the finest in Alaska; and a co-operative store, which the first year made a clear profit of 125 per cent., paying a cash dividend of 50 per cent. and adding 75 per cent. to the capital stock."

By this record it appears that the Secretary of the Interior, and his representatives in Alaska, not only did not enter upon arrangements for building another cannery in place of the one destroyed by fire, as asserted on page 5 of appellee's brief, but were unable to do so for lack of the necessary means. An attempt, however, was made to secure the necessary capital by an appropriation to be made by an act of Congress. The attempt was made by an amendment to the Senate Appropriation bill offered by Senator Nelson, which passed the Senate without debate but in the committee of conference when full information was given in the statements made by Senator Jones, the proposed appropriation was stricken from the bill. We make this assertion after having examined the sundry civil expense bill as it was finally enacted, and have found that it does not contain the item of $25,000 provided by the Nelson amendment.

By the statement made by Senator Jones, it is made to appear that the scheme of the Interior Department to enter into the fish canning industry on Annette Island is but a beginning of a general plan to make a pretense of assisting the Indians, foreign as well as natives of Alaska, as a means to an end, that is, to bring the entire fish industry of Alaska under bureaucratic control. That is undoubtedly the import of reference to the Hydaburg Colony setting forth the similarity of conditions in the conduct and

achievements of the colony settled on the West Coast of Prince of Wales Island, the inference being that these Hyda Indians having done so well they should be encouraged by assistance in the way of building canneries and leasing them in connection with the granting of exclusive rights of fishing.

On page 10 of the appellee's brief, *Farnham on Waters* and *Gould on Waters* are cited as authorities sustaining a contention that Congress has the right to grant exclusive rights of fisheries.

In the opening brief the limitations on the powers of the Government, in either of its executive or legislative branches, to grant exclusive rights of fisheries in public waters, have been shown and the authorities analyzed.

In view of the fact that the question had been settled by decisions of the Supreme Court and by the decision in the case of *Arnold* v. *Mundy,* referred to in such terms by the Supreme Court on two occasions as to make it a case of equal authority with the decision rendered by that court itself, we did not further inquire into the decisions of the State courts upon this subject. Since a reference, however, is made to the two text books mentioned, which in general terms seem to support the contention that a private fishery may be granted by the Legislature, we desire to direct the attention of the Court to the authorities cited by the authors themselves in support of this contention and to their effect upon the principle presented in the case at bar.

That the State has the right to regulate the fisheries cannot be doubted. The object of such regulation is to make the public right of fishery more valuable. In connection with the exercise of this right the State government may, in many instances, confer some private advantages upon individuals who, under the supervision of the State, do something to add value to the public right.

Thus, in many of the eastern States it was found that oysters would grow if planted in beds that did not naturally produce them. Accordingly, it became a great advantage to encourage the planting of oysters in such beds and thus adding to the output of the oyster fisheries. Individuals would not be warranted in planting oysters if they were not secure in the right to harvest them. Accordingly, it has been held that in connection with the right to regulate the oyster fisheries the State may allot oyster beds to individuals with the view of enabling such individuals to plant oysters therein and harvest the oysters so planted; and further, it has been found that the waters of many of the streams would produce fish not found therein. Accordingly, special privileges have in the State of Massachusetts especially, and probably in some other States also, been extended to persons planting new varieties of food fish in streams and ponds. These privileges, however, under the Massachusetts law did not extend to tidal waters. The cases relied upon by the authors named

depend, as far as we have been able to consult them, upon statutes of the character mentioned.

The first case cited by Farnham, is

Commonwealth v. *Weatherhead,* 110 Mass., 175.

This case refers to a right to fish in a pond by one who had planted a new species of fish in the pond under a statute giving such a one a special right as a reward for improving the value of the right of fishery.

The second case cited is

Rowe v. *Smith,* 48 Ct., 444.

The decision in this case relates to a statute regulating oyster planting. Under it, the shore is allotted to individuals for purposes of planting oysters and the act gives to such individuals the right to harvest the oysters so planted.

The case of

Commonwealth v. *Vincent,* 108 Mass., 441,

is the first case cited by Mr. Gould in his work on waters. This case deals with the statute giving those planting new varieties of fish special privileges to limited areas in waters not tidal.

In connection with the review of these Massachusetts cases, it is interesting to note what the Massachusetts courts have held upon the question now presented.

In the case of

Weston v. *Sampson,* 62 Mass., 351,

it was recited by the Supreme Court of Massachusetts that while under the Colonial Ordinances of Massachusetts an upland owner owned the tide flats, the public, nevertheless, had a right to go upon these tide flats for the purpose of exercising their common right of fishery, in so far as such flats were not actually covered by wharves or other improvements of that character, and that this right of the public included not only the right to catch floating fish but also to dig oysters from the soil itself.

In speaking upon this question, Chief Justice Shaw, who delivered the opinion of the Court, says:

> "There is no doubt, that by the common law of England all the subjects of the King have an common and general right of fishing in the sea, and in all bays, coves, branches and arms of the sea, which in general is held to extend to all places where tide ebbs and flows. The general rule is expressed by Lord Hale, *De Jure Maris, Hargr. Law Tracts,* 11, that all the people of England have a liberty of fishing in the sea, as of common right, and of this they cannot be lawfully deprived, even by the grant of the King."

Again it is stated:

> "And it has been frequently held, that the king takes this right of soil in trust for the public, so far as the fishing is concerned; and although the king may grant away this right of soil to another,

> yet his grantee will take it subject to the same trust; and by such grant, however comprehensive in its terms, the public, that is, the king's subjects, cannot be deprived of their common right."

Chief Justice Shaw further holds that if exclusive rights of fishing exist in an arm of the sea, they must be proved by ancient grant and that they cannot be founded if made within the time of memory, and cannot be sustained if made within the time of memory, and that such rights could not be conferred by the grant under Magna Charta.

It could serve no useful purpose to further review decisions of the State courts upon this question, but since the attention of the Court has been specially directed to these citations contained in the text books, we deem it well to call the Court's attention to the character of the cases relied upon as sustaining this proposition and the reason underlying these cases.

This same proposition was exhaustively and carefully inquired into by the Supreme Court of New Jersey in rendering the decision in

Arnold v. *Mundy,*

where it was said:

> "And I am further of opinion, that, upon the Revolution, all these royal rights became vested in the people of New Jersey, as the sovereign of the country, and are now in their hands; and that they, having themselves, both the legal title and the usufruct, may make such disposition of them,

and such regulation concerning them, as they may think fit; that this power of disposition and regulation must be exercised by them in their sovereign capacity; that the legislature is their rightful representative in this respect, and, therefore, that the legislature, in the exercise of this power, may lawfully erect, ports, harbours, basins, docks, and wharves on the coasts of the sea and in the arms thereof, and in the navigable rivers; that they may bank off those waters and reclaim the land upon the shores; that they may build dams, locks and bridges for the improvement of the navigation and the ease of passage; that they may clear and improve fishing places, to increase the product of the fishery; that they may create, enlarge and improve oyster beds, by planting oysters therein in order to procure a more ample supply; that they may do these things, themselves, at the public expense, or they may authorize others to do it by their own labour, and at their own expense, giving them reasonable tolls, rents, profits, or exclusive and temporary enjoyments; but still this power, which may be thus exercised by the sovereignty of the State, is nothing more than what is called the *jus regium,* the right of regulating, improving, and securing for the common benefit of every individual citizen. The sovereign power itself, therefore, cannot, consistently, with the principles of the law of nature and the constitution of a well ordered society, make a direct and absolute grant of the waters of the State, divesting all the citizens of their common right. It would be a grievance which never could be long borne by a free people."

It will not only be noted that the right of granting special privileges, referred to in the section quoted, is by the Court said to be nothing more than what

is called the *jus regium,* the right of regulating, improving, and securing for the common benefit of every individual citizen, but we desire to call the Court's special attention to the fact that in the case of

Illinois Central v. *State,*

Mr. Justice Field refers to this particular portion of the opinion in *Arnold* v. *Mundy,* with approval.

In this connection we wish to call the attention of the Court to the authorities cited for the reason that they do give support and prove conclusively what we contend for, namely, that all the power of the Government to control and regulate fishing rights is vested in the legislative department and therefore excludes the idea that the executive branch of the Government may interfere with individuals exercising the common right of fishery in public waters.

All of the Supreme Court decisions cited on pages 10 to 14 of the appellant's brief, have reference to the executive power to withdraw from sale lands within the public domain, and executive action of the bureau in charge of Indian affairs, and they fall far short of any expression by the Court of highest authority sustaining the executive power to interfere with the common right of fisheries in the public waters.

Those cases are all distinguishable from the case in hand by consideration of the fact that the Government of the United States is a land proprietor and